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No. 94-550 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GERDA DOROTHEA DEWEERTH,

Petitioner,

—v.—

EDITH MARKS BALDINGER AND WILDENSTEIN & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals err in finding that the district court abused its discretion by concluding that ***Erie Railroad Co. v. Tompkins***, 304 U.S. 64 (1938), required that a final judgment in a diversity case be vacated pursuant to Fed. R. Civ. P. 60(b) based on a subsequent change in state law announced in an unrelated state court decision three years after the federal judgment at issue had become final?

2. Did the court of appeals err in invoking and applying an "abuse of discretion" standard of review in reversing the judgment of the district court?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is not yet reported. The opinion of the district court (Pet. App. A28-A56) is reported at 804 F. Supp. 539.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1994. DeWeerth's petition for rehearing and suggestion for rehearing in banc was denied on August 23, 1994. The petition for a writ of certiorari was filed on September 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This common law diversity case concerns a dispute over the ownership of a painting. In 1983, petitioner DeWeerth purposely selected the federal district court as the forum in which to litigate her alleged entitlement to the painting "Champs de Blé a Vétheuil" by Claude Monet (the "Monet"), owned for the previous twenty-five years by respondent Edith Marks Baldinger. In 1987, the court of appeals reversed the judgment of the district court and held that DeWeerth's claim was barred by New York's statute of limitations, finding that DeWeerth had failed to pursue her claim with reasonable diligence in the nearly 40 years since the Monet had allegedly been lost. ***DeWeerth v. Baldinger***, 836 F.2d 103 (2d Cir. 1987). DeWeerth then filed a petition for a writ of certiorari, which was denied by this Court. 486 U.S. 1056 (1988).

On May 2, 1991, DeWeerth filed a motion in the court of appeals for recall of its 1988 mandate based on ***Solomon R. Guggenheim Foundation v. Lubell***, 77 N.Y.2d 311 (1991), a case in which the New York Court of Appeals addressed the same statute of limitations at issue in ***DeWeerth***. On May 17, 1991, the court of appeals denied the motion to recall the mandate without opinion. On September 27, 1991, DeWeerth filed a motion in the district court, pursuant to Fed. R. Civ. P. 60(b), for relief from the final judgment entered in accordance with this Court's mandate, citing the precise grounds presented in her recall motion. On October 16, 1992, the district court filed a Memorandum and Order granting DeWeerth's motion, Pet. App. A-28, and subsequently entered a judgment awarding the Monet to DeWeerth. On May 16, 1994, the court of appeals reversed the judgment of the district court, finding that the

lower court had abused its discretion in granting DeWeerth's motion for relief from the original judgment. Pet. App. A-1.

1. The painting at issue was purchased in 1957 by Mrs. Baldinger from respondent Wildenstein & Co., Inc. ("Wildenstein"),[1] a New York art gallery and dealer. Mrs. Baldinger purchased the painting in good faith, and without notice of any adverse claim, for $30,900.[2]

DeWeerth, a German citizen residing in Bonn-Bad Godesberg, Germany, claims that her father purchased the Monet in or about 1908. She also claims that she inherited it from her father upon his death in 1922, and that it remained in her possession until August, 1943. In that month, DeWeerth claims that she sent the paintings in a furniture van to her sister, Gisela von Palm, at her castle in Oberbalzheim, in southern Germany, for safekeeping during World War II. DeWeerth alleges that she never saw the painting again.

The painting allegedly disappeared from Mrs. von Palm's custody.[3] Upon learning of the loss of the painting, DeWeerth, whom the court of appeals described as a "wealthy and sophisticated art collector," 836 F.2d at 112, admits that she took only four steps in 35 years to locate it. First, in 1946 (a year after the alleged loss), she allegedly filed a report with the military government then administering Germany. No documentary proof of any such report was offered at trial. Second, in 1948, she wrote a letter to a lawyer, Dr. Heinz Frowein, concerning the Monet and several other paintings and art objects lost during the War. Dr. Frowein replied that DeWeerth's insurance company would not indemnify her for the missing painting "because we cannot prove that it was a case of burglary." Frowein did nothing further. Third, in 1955, DeWeerth sent a photograph of the Monet to Dr. Alfred Stange, a historian of medieval art who possessed no expertise in French Impressionist paintings. Dr. Stange advised DeWeerth that her evidence was insufficient and did nothing. Fourth, and finally, in 1957, DeWeerth filled out a report for the

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1. Wildenstein has no parent companies, subsidiaries or affiliates.

2. Respondents also adopt the statement of facts contained in the original opinion of the court of appeals. 836 F.2d at 104-06.

3. Mrs. von Palm, the only witness competent to testify about the disposition of the painting, died on June 11, 1983, four months after the present action was commenced. DeWeerth did not preserve her testimony.

Bundeskriminalamt listing art works lost during the War. A copy of the report was not offered at trial. DeWeerth did nothing to locate the painting after 1957.

The court of appeals observed that "[c]onspicuously absent from [DeWeerth's] attempt to locate the painting is any effort to take advantage of several mechanisms specifically set up to locate art lost during World War II." 836 F.2d at 111. Pursuant to an agreement among the Allies, Central Collecting Points ("CCP") were established throughout Germany, where recovered works of art were identified and stored, and where the owners of missing works could inquire after their property. DeWeerth knew of the CCP's presence in post-War Germany and its role in collecting lost works of art and facilitating their return. She never contacted any CCP regarding the Monet.

The United States also conducted its own independent program to recover art work stolen during World War II. In the post-War period, the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas sent letters to museums, libraries, universities and art dealers identifying missing works of art and requesting assistance in locating them. The State Department also initiated a program to return works of art displaced during World War II. DeWeerth failed to avail herself of these resources. Nor did she ever contact or retain any other museum, investigative agency, attorney, art expert or private investigator to assist her in locating the Monet.

DeWeerth never looked for mention of the Monet in art publications. The court of appeals noted that "if DeWeerth had undertaken even the most minimal investigation during this period [1957-1981], she would very likely have discovered the Monet, since there were several published references to it in the art world." 836 F.2d at 112. The Monet was twice displayed at public exhibitions and was also mentioned in four different published works during this period. The two public exhibitions were the *Festival of Art*, an exhibition held at the Waldorf-Astoria Hotel in New York in 1957, and *One Hundred Years of Impressionism*, an exhibition held at Wildenstein's gallery in New York in April, 1970. The Monet was mentioned in both exhibition catalogues; in addition, the Monet was illustrated in a book by Daniel Wildenstein entitled *Monet: Impressions*, published in New York and Lausanne, Switzerland in 1967.

Finally, the Monet is described, photographed, and identified in the work *Claude Monet: Bibliographie et Catalogue Raisonné, Volume I, 1840-1881*, introduction by Daniel Wildenstein, published by La Bibliotheque Des Arts, Lausanne and Paris, in 1974. The court of appeals noted that "a catalogue raisonné is a definitive listing and accounting of the works of an artist," and concluded that DeWeerth's failure to consult the Monet catalogue raisonné "is particularly inexcusable." 836 F.2d at 112.

DeWeerth learned of Baldinger's possession of the Monet through Peter von der Heydt, DeWeerth's nephew. In 1981, von der Heydt was told, in a chance conversation with a cousin, that DeWeerth owned a Monet that disappeared during the War. Shortly thereafter, he consulted the Monet catalogue raisonné which he found in a museum in Cologne, less than 20 miles from where DeWeerth has been living since 1957. The catalogue identified Wildenstein as a prior owner and exhibitor of the painting. In 1982, DeWeerth commenced litigation against Wildenstein in the New York state courts to compel Wildenstein to identify the current owner. In that litigation, Wildenstein was directed to identify Baldinger. After Baldinger refused DeWeerth's demand for the painting, the present litigation was commenced.

2. Nearly three years after this Court denied DeWeerth's first petition for a writ of certiorari and the judgment in favor of respondents had become final, DeWeerth sought relief from that judgment, arguing that she was entitled to the "benefit" of the New York Court of Appeals' opinion in ***Guggenheim***. On DeWeerth's motion under Fed. R. Civ. P. 60(b), the district court held that the jurisdictional principles underlying ***Erie*** and its progeny required that this case be decided in accordance with the subsequent state court decision in ***Guggenheim***, concluding that had DeWeerth litigated her claim in the New York state courts, she would have prevailed on the statute of limitations defense found to be dispositive by the court of appeals in its original opinion. Pet. App. A-41. The district court summarily entered judgment for DeWeerth without giving notice to the parties, holding an evidentiary hearing, reopening the record or otherwise permitting the submission of evidence, and despite the fact that both the ***Guggenheim*** court and the court of appeals in ***Hoelzer v. City of Stamford, Conn.***, 933 F.2d 1131 (2d Cir. 1991), recognized that a laches defense remained available against a plaintiff who failed to exercise due diligence in pursuit of a claim. Finally, in entering judgment, the district

court relied on what the court of appeals had described in its original opinion as "hearsay evidence of questionable value" in concluding that DeWeerth had superior title.

3. The court of appeals reversed, finding that the district court had abused its discretion in granting DeWeerth's motion under Fed. R. Civ. P. 60(b). The court rejected DeWeerth's argument that the original ***DeWeerth*** panel had misapplied existing state law. To the contrary, the court of appeals specifically found that:

> [W]e do not agree that ***Guggenheim*** stated that the question decided by the [original] ***DeWeerth*** panel had long been settled in New York. The ***Guggenheim*** court stated only that New York's demand and refusal rule [for determining when the statute of limitations begins to run] was well established; it did not state that the question of whether a due diligence requirement should be added to this rule was clearly settled. In fact, no earlier New York case had addressed the issue. The earlier ***DeWeerth*** panel noted that this question was an open one. . . .

Pet. App. A-13. The court of appeals reasoned that "when confronted with an unsettled issue of state law, a federal court sitting in diversity must make its best effort to predict how the state courts would decide the issue." *Id.* The court of appeals further held that "the prior ***DeWeerth*** panel made a reasonable prediction of how New York courts would decide the due diligence question given the information presented to it, and [we] conclude that ***Erie*** and its progeny require no more than this." *Id.* at A-15. In the circumstances, the court of appeals concluded that an unrelated state court decision, announcing a subsequent change in state law three years after the present case had become final, "d[id] not impugn the integrity of the [original] ***DeWeerth*** decision or the fairness of the process that was accorded DeWeerth." *Id.* at A-14.

Having found that the original panel's opinion had not offended ***Erie*** principles, the court of appeals held that the ***Guggenheim*** opinion did not provide grounds for relief under Fed. R. Civ. P. 60(b). In particular, the court concluded that "the district court abused its discretion

in determining that the important interest in finality of the judgment in this case was outweighed by any injustice DeWeerth believes she has suffered by choosing to litigate in the federal as opposed to the state forum." *Id.* at A-17. According to the court of appeals, "[t]here is nothing in ***Erie*** that suggests that consistency must be achieved at the expense of finality, or that federal cases finally disposed of must be revisited anytime an unrelated state case clarifies the applicable rules of law." *Id.* at A-16. Thus, the court of appeals held, DeWeerth was not entitled "to reopen a federal court case that has been closed for several years in order to gain the benefit of a newly-announced decision of a state court, a forum in which she specifically declined to litigate her claim." *Id.* at A-12. In its disposition of the appeal, the court of appeals had no occasion to reach — and therefore did not decide — a number of other bases presented by respondents for reversing the judgment of the district court.

ARGUMENT

By her Petition, DeWeerth seeks — for the second time — review of a decision of the court of appeals construing and applying the New York statute of limitations to a set of undisputed facts. Having tried and failed to convince the New York federal courts of her entitlement to certain allegedly stolen property, DeWeerth now invites the Court to transform a simple diversity case into a case of constitutional significance. Neither the record nor the first principles she purports to invoke, justify the extraordinary review and relief DeWeerth seeks. As we demonstrate more fully below, DeWeerth's Petition proceeds from a fundamental mischaracterization of the court of appeals' opinions in this case and is not supported by the bedrock doctrine upon which it is purportedly founded.

First, contrary to DeWeerth's repeated suggestions, this case did *not* involve a federal court's "modification" of well-established state law; rather, in its first opinion, the court of appeals attempted in good faith to predict how the New York state courts would resolve an unsettled question of state law. That a subsequent state court decision was more to DeWeerth's liking does not relieve her of the consequences of her tactical decision to litigate in a federal forum or condemn the federal decision to ceaseless review under ***Erie*** and its progeny. Even accepting the Petition on its face, DeWeerth's position would brand every mistaken prediction of state law by a federal court an error of constitutional dimension and make the door to the federal courts in diversity cases a perpetually revolving one.

Second, DeWeerth contends that the court of appeals applied the "abuse of discretion" standard of review — employed universally and without controversy by each and every circuit court in reviewing determinations under Fed. R. Civ. P. 60(b) — in name only. This "question" presented for review ignores controlling authority on point and and is unworthy of this Court's attention.

Third, and finally, review is unwarranted because there are ample independent bases to affirm the decision of the court of appeals. That court has now twice rejected DeWeerth's claim — which was based, in its view, on "hearsay evidence of questionable value" — without even reaching the merits of respondents' other defenses. Chief among those defenses was

the doctrine of laches, a defense that the intermediate state appellate court in ***Guggenheim*** (the very case relied on by DeWeerth) found to be established and dispositive of the matter. In the circumstances, review here would be a waste of the Court's resources.

POINT I

THE DECISION BELOW WAS FULLY CONSONANT WITH *ERIE* AND THE POLICIES UNDERLYING FED. R. CIV. P. 60(b)

The basic premise of DeWeerth's Petition is simply incorrect. At the time DeWeerth commenced this action, the statute of limitations issue remained unsettled under New York law. The Second Circuit recognized this point in both of its opinions. 836 F.2d at 108; Pet. App. A-13. When this action began, the leading authority on the statute of limitations issue was the court of appeals' decision in ***Kunstsammlungen Zu Weimar v. Elicofon***, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982), in which the court discussed a due diligence requirement with respect to a plaintiff's efforts to recover stolen art. Even in 1989, the New York state trial court in ***Guggenheim*** relied on the Second Circuit's original opinion and reasoning in ***DeWeerth*** on the statute of limitations issue as a correct — and controlling — statement of New York law. *See* ***Guggenheim***, 153 A.D.2d 143, 146 (1st Dep't 1990). If that decision was as blatant an aberration as DeWeerth now claims, no New York trial court would have followed it and explicitly approved it.

Thus, there is nothing extraordinary about this diversity case. DeWeerth elected to litigate in federal court and exhausted all avenues of appellate review. Indeed, notwithstanding ***Guggenheim*** — and even in light of it — DeWeerth would not have prevailed on her claim in either state or federal court. *See* Point III, *infra*. As such, the present Petition, like many before it, may be disposed of simply on the basis of this Court's long-standing deference to determinations of state law by intermediate federal appellate courts. *See* ***Huddleston v. Dwyer***, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law

by the intermediate federal appellate courts"); ***Haring v. Prosise***, 462 U.S. 306, 314 n.8 (1983); ***Bishop v. Wood***, 426 U.S. 341, 346 n.10 (1976).

Neither ***Erie*** nor any other principle of law stands for the proposition that a subsequent change in state law, years after a case has ceased to be *sub judice*, presents grounds sufficient to vacate a federal court's final judgment in an unrelated case. On the contrary, considerations of finality of litigation, judicial economy and the interests of justice dictate that prior rulings of federal courts should be left undisturbed. *See* ***Marino v. Ortiz***, 888 F.2d 12, 14 (2d Cir. 1989), *cert. denied*, 495 U.S. 931 (1990) (refusing to reopen final judgment three years after mandate has issued because of "the interest in finality of judgments, particularly those as old as the instant case"). To read ***Erie***, as DeWeerth urges, as entitling parties such as DeWeerth, years after final disposition of her case, to gain the benefit of a decision of the state court in which she specifically declined to litigate her claim, would recast a bedrock doctrine of federalism beyond recognition. *Cf.* ***Socialist Republic of Romania v. Wildenstein***, 147 F.R.D. 62, 65 (S.D.N.Y. 1993) ("Rule 60(b) will not afford plaintiff relief from . . . its litigation strategy"); ***Wagner Spray Tech Corp. v. Wolf***, 113 F.R.D. 50, 53 (S.D.N.Y. 1986) (movant's "interest in undoing the results of a litigation strategy which, in hindsight, appears unwise, fails to outweigh the judiciary's interest in the finality of judgments").

If DeWeerth's view of ***Erie*** is correct, then every diversity case that involves a mistaken prediction of state law — indeed, every diversity case in which skillful advocates could argue that a particular issue of state law (whether open or settled) would be decided differently by the state courts — would become a case of constitutional significance. If the Court were to accept DeWeerth's position, then diversity cases would be subject to perpetual exhumation and review *every* time a state court resolves an open question of law in a manner that arguably departs from a determination set forth in a federal judgment. That much is clear from the face of DeWeerth's Petition, which describes the proceedings below in "phases" (Pet. at 2-4). There is nothing in DeWeerth's Petition to suggest a principled basis for determining when (if ever) the "final" phase in this and numerous other diversity cases has been concluded. In the words of the court of appeals, DeWeerth's proposed regime "is simply an improvident course that would encourage countless attacks on federal judgments long since closed." Pet. App. A-16.

Fed. R. Civ. P. 60(b) has never been read, as DeWeerth would have it, to sacrifice the finality of federal court judgments in the interest of relieving a party of the consequences of her litigation strategy. That rule may be applied to relieve a party from final judgment only under "extraordinary circumstances." ***Liljeberg v. Health Services Acquisition Corp.***, 486 U.S. 847, 864 (1988). A subsequent change in state law in an unrelated case does not constitute such extraordinary circumstances. *See, e.g.*, ***Travelers Indem. Co. v. Sarkisian***, 794 F.2d 754, 757 (2d Cir.) ("a change in decisional law is not grounds for relief under Rule 60(b)(6)"), *cert. denied*, 479 U.S. 885 (1986); ***Picco v. Global Marine Drilling Co.***, 900 F.2d 846, 851 (5th Cir. 1990); ***Ben Hur Construction Company v. Goodwin***, 116 F.R.D. 281, 284 (E.D. Mo. 1987), *aff'd*, 855 F.2d 859 (8th Cir. 1988); ***Loucke v. United States***, 21 F.R.D. 305, 308-09 (S.D.N.Y. 1957); ***Atwell v. Equifax, Inc.***, 86 F.R.D. 686, 688 (D. Md. 1980); ***Brown v. Clark Equipment Company***, 96 F.R.D. 166, 173 (D. Me. 1982).

This case provides no occasion to expand the scope of ***Erie*** and Fed. R. Civ. P. 60(b) to afford relief from final judgments to disappointed diversity plaintiffs in countless past, present and future cases.

POINT II

THE APPROPRIATE STANDARD OF APPELLATE REVIEW OF A GRANT OF A FED. R. CIV. P. 60(b) MOTION — THE ABUSE OF DISCRETION STANDARD — WAS CORRECTLY INVOKED AND APPLIED BY THE COURT OF APPEALS

DeWeerth's contention that the Court must accept certiorari in order to clarify the appropriate standard of appellate review of the grant of a Fed. R. Civ. P. 60(b) motion is utterly without merit. No dispute exists among the circuits as to the standard to be used in reviewing Fed. R. Civ. P. 60(b) motions, as DeWeerth herself concedes (Pet. at 11 & n.7). Appellate courts reviewing such motions have uniformly employed an abuse of discretion standard. The opinion below does not deviate from established federal law; the court of appeals not only expressly invoked the abuse of discretion standard, but diligently and responsibly applied it to the facts of this case. In truth, DeWeerth's challenge to the standard

used by the court of appeals in reviewing the district court's ruling is merely a second attempt to criticize the reasoning of the result reached.

Drawing on case law both from within and without the Second Circuit, the court of appeals unambiguously articulated the pertinent standard of review for Fed. R. Civ. P. 60(b) motions: "A 'district court's *grant or denial* of relief under Rule 60(b), unless rooted in an error of law, may be reversed only for abuse of discretion.'" Pet. App. A-10 (quoting ***Twelve John Does v. District of Columbia***, 841 F.2d 1133, 1138 (D.C. Cir. 1988), and citing ***Matarese v. LeFevre***, 801 F.2d 98, 107 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987)) (emphasis added). DeWeerth cites no contrary authority from within any circuit. Instead, she argues that the court of appeals opinion itself diverges from the abuse of discretion standard used in other circuits by actually reviewing the district court decision *de novo*.

To determine whether the court of appeals really meant what it said when it expressly invoked the abuse of discretion standard of review, the Court need probe no further than the Second Circuit's articulation of the standard itself. In ***Salve Regina College v. Russle***, 499 U.S. 225 (1991), respondent contended that appellate courts professing adherence to a deferential standard were actually reviewing *de novo* district court determinations of state law. The Court stated: "We decline the invitation to assume that courts of appeals craft their opinions disingenuously. The fact that an appellate court overturns an erroneous determination of state law in no way indicates that the appellate court is not applying the rule of deference articulated in the opinion." *Id.* at 236. By the same token, that the court of appeals here found the district court's Fed. R. Civ. P. 60(b) ruling to be erroneous does not mean that the appellate court neglected to employ the abuse of discretion standard.

But even were the Court to examine the standard of review employed by the court of appeals, there is no basis to conclude that the court failed to engage in an appropriate analysis. Although the abuse of discretion standard requires appellate courts to afford substantial weight to the decisions of district courts, such deference does not require the "'appellate courts [to] suspend their own thought processes.'" ***Salve Regina College***, 499 U.S. at 237 (quoting ***In re McLinn***, 739 F.2d 1395, 1404 (9th Cir. 1984)). The abuse of discretion standard does not preclude an appellate court from reviewing a district court ruling; it simply prevents the appellate court from substituting its own judgment for that of the

district court when the lower court decision is reasonable and has considered the relevant factors. ***Piper Aircraft Co. v. Reyno***, 454 U.S. 235, 257 (1981). Because the effect of the district court's ruling here, among other things, "would encourage countless attacks on federal judgments long since closed," the court of appeals found that the district court had abused its discretion in granting relief from the final judgment under Fed. R. Civ. P. 60(b).

DeWeerth's argument that the Court should clarify the standard for reviewing the "grant" of Fed. R. Civ. P. 60(b) motions, as opposed to the "denial" of such motions, turns on a distinction without a difference. Standards of review generally correspond to the authority invested in the lower court, not the outcome of the dispute. Where the district court decides an issue of law, the appellate court reviews *de novo*; where the issue is a question of fact, it is reviewed under a clearly erroneous standard; and finally, if the matter is left to the discretion of the district judge, the scrutiny is for abuse of discretion. ***Pierce v. Underwood***, 487 U.S. 552, 558 (1988). In a few instances, the reviewability of a district court determination is established by statute or by a historical tradition and might deviate from one of the categories. *Id.* Fed. R. Civ. P. 60(b) is not such a case. It is, in fact, a highly discretionary device, upon which there could be no doubt but that abuse of discretion is the standard of review no matter the result of the ruling, as the Second Circuit has made clear. *See* ***Matarese***, 801 F.2d at 107. The standard of review of Fed. R. Civ. P. 60(b) determinations is undisputed among the circuits and was properly invoked and applied here, rendering clarification by the Court utterly unnecessary.

POINT III

THERE ARE AMPLE INDEPENDENT BASES FOR AFFIRMING THE DECISION OF THE COURT OF APPEALS

Even if the Court were inclined to review the court of appeals' reversal of the district court's grant of DeWeerth's Fed. R. Civ. P. 60(b) motion, the disposition of the appeal was nonetheless correct, for DeWeerth's claim was barred by the doctrine of laches, one of several defenses the court of appeals found unnecessary to reach and therefore did

not decide. Respondents are entitled to defend the judgment of the court below on any ground raised below, whether relied upon by the court or not. ***Washington v. Yakima Indian Nation***, 439 U.S. 463, 476 n.20 (1979); ***United States v. New York Telephone Co.***, 434 U.S. 159, 166 n.8 (1977).

A claim may be barred by the defense of laches where a plaintiff unreasonably delays commencing an action and that delay operates to the prejudice of a defendant. Pet. App. A-52 (citing ***In re Estate of Barbash***, 31 N.Y.2d 76, 334 N.Y.S.2d 890, 894-895 (1972)). However, without affording the parties an opportunity for a hearing and without reopening the record or considering any evidence on the issue, the district court found that DeWeerth's 40-year delay in bringing suit was reasonable and that, in any event, Mrs. Baldinger suffered no prejudice as a result of this delay. Pet. App. A-54. These findings are based not on evidence, but solely on "inferences" drawn by the district court. Moreover, these findings are directly contrary to the court of appeals' conclusions in the original ***DeWeerth*** opinion on the issue of due diligence, which were binding on the district court with respect to the defense of laches. ***See Guggenheim***, 77 N.Y.2d at 321 (defendant's "contention that [the plaintiff] did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of [defendant's] laches defense"); ***Hoelzer***, 933 F.2d at 1137-38 ("[t]he doctrine of laches sufficiently safeguards the interests of a good faith purchaser of lost art by weighing in the balance of competing interests the owner's diligence in pursuing her claim").

The Appellate Division in ***Guggenheim*** stated that the court of appeals' conclusions in its original ***DeWeerth*** opinion essentially established the laches defense:

> [T]he dismissal in ***DeWeerth*** appears to have been based not on the lapse of any particular period of time, but on an estoppel. Its gist is that although the plaintiff's title to the stolen property might be lawful, she should not be heard to assert it because the delay attributable to her lack of diligence in searching for the property prejudiced the defendant in her defense. That is laches. While no express finding of prejudice,

> a necessary element of laches, was made, because none was thought to be needed, there was, however, an explicit reference to a deceased witness, faded memories, lost documents, hearsay testimony of questionable value, and the "injustice" of having "to defend under these circumstances." ... We prefer to characterize the defense ... [of] lack of diligence in searching for stolen property, as opposed to unreasonable delay in making a demand upon a known possessor, as laches.

153 A.D.2d 143, 149. *See also* ***Hoelzer***, 933 F.2d at 1139 (Newman, J., concurring) (result of ***Guggenheim*** is to permit "a court encountering a dispute between a theft victim and a good-faith purchaser to consider and balance all the equities, including the reasonableness of the efforts the theft victim made to locate the property ... the diligence of the original owner is to be considered not in determining accrual of the statute of limitation as we thought in ***DeWeerth***, but only in assessing the equities under the doctrine of laches").

Accordingly, whether viewed as the lack of diligence in pursuing a claim for allegedly stolen property under the statute of limitations or the equitable doctrine of laches, DeWeerth unreasonably delayed in prosecuting her claim and Mrs. Baldinger was in fact prejudiced by such delay. As such, review by this Court would not alter the outcome below.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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